BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KYLE WERNER	)	
Claimant	)	
	)	
VS.	)	
	)	
C2I HOLDING, LLC.	)	
Respondent	)	Docket No. **1,060,394**
	)	
AND	)	
	)	
GENERAL CASUALTY CO. OF WI	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the December 13, 2013,[1] preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Melinda G. Young, of Hutchinson, Kansas, appeared for claimant. Katie M. Black, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits, dated June 26, 2012; reports from Dr. Paul Stein dated September 7, 2012 and September 19, 2012; the report of the court-appointed physician, Dr. David Hufford, dated October 30, 2012; and all pleadings filed of record with the Division.

ISSUES

The ALJ found claimant failed to sustain his burden of proof that he suffered personal injury by a series of repetitive trauma arising out of and in the course of his employment. Specifically, the ALJ found claimant's work activities were not the prevailing factor in causing claimant's injury and need for medical treatment.

Claimant requests the Board reverse the preliminary hearing Order and find the claim compensable.

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[1] Due to a typographical error, the Order date should be December 13, 2012.

Respondent argues the ALJ's Order should be affirmed.

The sole issue is whether claimant's alleged series of repetitive trauma was the prevailing factor in causing claimant's injury and need for medical treatment.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Kyle Werner was age 21 when the June 26, 2012, preliminary hearing occurred. Claimant commenced employment with respondent in August 2011. Claimant worked full-time as a "constructional wireman"[2] for respondent. His job duties included helping journeymen electricians, moving materials, setting up job sites, lifting, bending, and working on his hands and knees. Claimant agreed that the job was physically demanding, which was corroborated by his supervisor, Nathan Asberry.[3]

Claimant's application for hearing, filed on April 11, 2012, alleged an accident on or about November 2011 and each and every working day thereafter. The cause or source of the accident was claimed to be "[r]epetitive."

Claimant testified that in November 2011, he experienced the following:

> At the time we were doing normal work that we do every day. And my back -- my lower back started giving me problems. And at first it wasn't very bad and I was working through it. And it started progressively getting worse and worse.[4]

Claimant further testified:

> It started in my lower back as kind of a pinching dull pain. And it really wasn't that bad. I'd go home, I'd go to sleep and it would go away. And then it started progressing. My lower back started hurting and then my butt cheek started hurting and down the back of my leg and right calf and it was all hurting.[5]

Claimant did not specify what work-related activities caused the onset of his symptoms or made them worse.

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[2] P.H. Trans. at 6.

[3] *Id.* at 41.

[4] *Id*. at 7.

[5] *Id*. at 7-8.

On his own, claimant sought and received medical treatment from a number of medical providers. The treatment including physical therapy and three epidural injections. Claimant stopped working for respondent in the first part of April 2012.

Nathan Asberry, respondent's electrical project manager, testified that claimant did not report a work-related injury to him. According to Mr. Asberry:

> A. My understanding of the situation was that Kyle had back issues and occasionally at work it would become inflamed from any given number of things and so he would request time off.
>
> Q. So did you have an understanding that when he came to work for C2I he already had some back problems?
>
> A. That was the way I understood it.[6]

Mr. Asberry admitted Mr. Werner informed him that standing or carrying things made his back worse.[7]

On May 22, 2012, Dr. George Fluter, a specialist in pain management, examined and evaluated claimant at the request of claimant's attorney. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Fluter diagnosed low back and right lower extremity pain, lumbar discopathy and probable right lower extremity radiculopathy. Dr. Fluter opined: 1) "there is a causal/contributory relationship between Mr. Werner's current condition and repetitive work-related activities" and 2) "the prevailing factor is the repetitive work-related activities of an electrician."[8] Dr. Fluter did not identify what "work-related activities" were the prevailing factor causing the injury.

The ALJ entered an Order dated August 17, 2012, which provides in part:

> TTD is ordered from April 19, 2012 through the date of receipt of Dr. Stein's report on behalf of the Respondent at the appropriate rate. The issues of authorized medical and potential notice defenses are deferred until a phone conference after both parties are in receipt of Dr. Stein's opinion.

No request for Board review of the August 17, 2012, Order was filed.

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[6] *Id*. at 33

[7] *Id*. at 40-41.

[8] *Id*., Cl. Ex. 1 at 5.

Dr. Stein examined claimant at the request of respondent on July 17, 2012. That examination resulted in three reports authored by Dr. Stein. Only his reports dated September 7, 2012, and September 19, 2012, are in the record. In the latter report, Dr. Stein opined:

> A telephone conference was held today with attorney Kendra [Oakes] regarding my report of 9/7/12. At that time, I reviewed chiropractic records of Dr. Bothwell on Mr. Werner for treatment of back pain in September and November of 2010. There were also records in January of 2011 reporting back pain. In the second paragraph of my report dated 9/7/12 the last sentence states "the above treatments are after the onset of this employment and do not document preexisting symptomatology". This statement is incorrect. I believe that I had some confusion between September of 2010 as opposed to September of 2011. Clearly, the records of 2010 as well as the early records in 2011 document complaints of back pain by Mr. Werner prior to his employment at [C2I] Electric, which did not begin until August of 2011.
>
> Please refer also to the next to last paragraph on page 6 of my report dated 7/18/12 in which I indicated that preexisting symptomatology in the records of Dr. Bothwell would indicate that the prevailing factor in the current symptoms was the preexisting symptomatology and pathology. The above records of Dr. Bothwell reflect such symptomatology present prior to Mr. Werner's employment at [C2I] Electric. Therefore the prevailing factor is not related to his work activity.
>
> I apologize for any confusion generated by my 9/7/12 report. If there are any further questions, please contact me.[9]

After his receipt of Dr. Stein's reports, the ALJ entered another Order, dated September 28, 2012, which provides:

> Dr. Stein has indicated that in his opinion the claimant's work activities are not the prevailing factor in the claimant's need for treatment. The court finds that the claimant gave notice to his employer, and that notice predates the actual filing of a claim. The court preliminarily finds that both parties were aware of claimant's injury and were attempting to avoid filing a claim. When their plans unraveled, a claim was formally filed. The court orders an IME from Dr. Hufford for the purpose of obtaining his opinion on a diagnosis, treatment recommendations and a causation opinion, including a prevailing factor analysis.

No request for Board review of the September 28, 2012, Order was filed.

Dr. David Hufford examined claimant on October 30, 2012. He took a history, reviewed medical records and reports, and conducted a physical examination. The doctor diagnosed recurrent low back pain and left L4-5 disk herniation. Dr. Hufford opined:

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[9] Stein's Notes dated Sep. 19, 2012.

> I have been asked to provide my opinion regarding causation and further treatment. It is clear from his history that Mr. Werner has had several episodes of low back pain beginning with a minor traumatic event approximately 2 years ago while employed in a nursing facility in Manhattan, Kansas. He has findings on his MRI and CT scan of degenerative changes that have not occurred because of any acute traumatic event. He does not describe any acute traumatic event that occurred during his employment with [C2I] Electric but rather the insidious onset of low back pain on one specific day during the conduct of his usual employment duties. It is my opinion that his current symptoms are not the result of his work activity with this employer and that the prevailing factor in his current symptomatology is a gradual and insidious progression of degenerative disc disease resulting in an apparent left L4-L5 disc herniation. Even if this disc herniation occurred during the conduct of his work as an electrician with the employer in question, this herniation would not have occurred in another individual performing the same work activities without the preexisting degenerative findings that are present and possibly initiated by the traumatic event that occurred 2 years earlier while working in a nursing facility. Surgical intervention as recommended by Dr. Moskowitz is reasonable but should not be performed under the worker's compensation system under the principal of prevailing factor and this causation analysis. He should be restricted to relatively sedentary activities but this restriction is not the result of his work activities with [C2I] Electric or any acute or specific work injury that occurred during this employment.

After receipt of Dr. Hufford's report, the ALJ issued his December 13, 2012 Order which is the subject of this review.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) provides:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

. . .

(f) (1) "Personal injury" and "injury"mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injuries may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . .

(3)(A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

K.S.A. 2011 Supp. 44-508(g) and (h) provide:

“Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

The undersigned Board member agrees with the ALJ that claimant did not sustain his burden of proving personal injury by a series of repetitive trauma arising out of and in the course of his employment.

Claimant did not testify how he suffered injury. He did not say what particular activities required by his work for respondent he felt caused low back injury, nor did he testify what work-related duty he was performing for respondent when his low back symptoms began.

Moreover, the record is clear that claimant's low back symptoms began before he started working for respondent. When claimant was first seen by Dr. Moskowitz on March 8, 2012, he provided the doctor with a history of an onset of low back pain one and one half years earlier, before claimant started working for respondent. Claimant told Dr. Moskowitz his back pain began when he was working as a CNA for Stoneybrook Retirement Center in Manhattan, Kansas, when claimant was lifting a patient. Claimant did not tell Dr. Moskowitz he injured his back working for respondent.

Claimant was seen for low back pain by Jay Wedel, a physician's assistant associated with Mid Kansas Family Practice, on December 20, 2011. Claimant was seen at the same clinic on three additional occasions. There is no indication in those medical records claimant attributed his low back and right lower extremity symptoms to his work for respondent.

The preponderance of the credible evidence establishes claimant, despite his relatively young age, suffers from lumbar degenerative disc disease unrelated to his work duties for respondent. The report of the lumbar MRI conducted on January 18, 2012, revealed "at level L5-S1 mild disc desiccation with central protrusion in conjunction with mild facet arthropathy and mild ligamentum flavum hypertrophy. Congenital short pedicles are contributing to at least mild central canal stenosis. At level L4-5, there are congenital short pedicles without compressive disc disease or frank central and neural foraminal stenosis."[10] There may be a "contributory" relationship between claimant's work activities and his symptoms, as noted by Dr. Fluter. Dr. Fluter also opined claimant's work activity was the prevailing factor, however, Dr. Fluter had virtually no details about what claimant's work required. This Board member agrees with Judge Klein that the most credible opinion

[10] P.H. Trans., Cl. Ex. 1 at 21.

regarding prevailing factor is that of the neutral, court-appointed physician, Dr. Hufford. Dr. Hufford's opinion is corroborated by Dr. Paul Stein, a board certified neurosurgeon, which lends additional credence to Dr. Hufford's opinion.

Although there is evidence in the record which supports claimant's position, the preponderance of the credible evidence establishes claimant's work duties were not the prevailing factor in causing his injury and need for medical treatment.

CONCLUSION

Claimant did not sustain his burden to prove his alleged personal injury by repetitive trauma was the prevailing factor causing claimant's injury, nor did claimant prove his back injury arose out of and in the course of his employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[12]

WHEREFORE, the undersigned Board Member finds that the December 13, 2012, preliminary hearing Order entered by ALJ Thomas Klein should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

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[11] K.S.A. 44-534a.

[12] K.S.A. 2011 Supp. 44-555c(k).